

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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TINA L. LAWTON,

Plaintiff,

v.

Civil Action No.  
6:16-CV-0317 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

DRAKE LOEB PLLC  
555 Hudson Valley Avenue  
Suite 100  
Windsor, NY 12553

GARY J. GOGERTY, ESQ.

FOR DEFENDANT

HON. RICHARD S. HARTUNIAN  
United States Attorney for the  
Northern District of New York  
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100 S. Clinton Street  
Syracuse, NY 13261-7198

MICHELLE L. CHRIST, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
CHIEF U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Acting Commissioner, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on January 5, 2017, during a telephone conference held on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Acting Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Acting Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

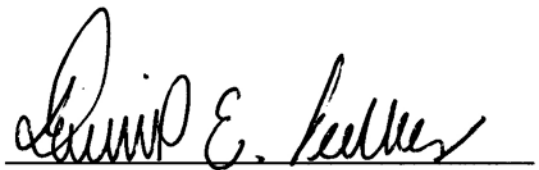
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Acting Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Acting Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: January 6, 2017  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
TINA L. LAWTON,

Plaintiff,

vs.

6:16-CV-317

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

*Decision - January 5, 2017*

James Hanley Federal Building, Syracuse, New York

HONORABLE DAVID E. PEEBLES

United States Magistrate-Judge, Presiding

A P P E A R A N C E S (by telephone)

For Plaintiff:       DRAKE, LOEB LAW FIRM  
                          Attorneys at Law  
                          555 Hudson Valley Avenue  
                          New Windsor, New York 12553  
                          BY: GARY J. GOGERTY, ESQ.

For Defendant:       SOCIAL SECURITY ADMINISTRATION  
                          Office of General Counsel  
                          26 Federal Plaza  
                          New York, New York 10278  
                          BY: MICHELLE L. CHRIST, ESQ.

*Eileen McDonough, RPR, CRR  
Official United States Court Reporter  
P.O. Box 7367  
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(315) 234-8546*

1           THE COURT: I have before me a request for judicial  
2 review of an adverse termination by the Acting Commissioner  
3 pursuant to 42, United States Code, Sections 405(g) and  
4 1383(c)(3).

5           The background is as follows. Plaintiff was born  
6 in January of 1964 and is currently 53, about to turn 54,  
7 years old. She was 44 years old at the time of the alleged  
8 onset of her disability. Plaintiff lives in Johnstown with a  
9 son who was at the time of the hearing in this matter 19  
10 years old. Plaintiff has an eighth grade education. She was  
11 placed in regular classes. At age 20 she achieved a GED  
12 diploma.

13           She drives. She last worked in August of 2008.  
14 She has worked as a cook and for four years as a housekeeper.  
15 She stopped working due to COPD and asthma, as well as carpal  
16 tunnel syndrome, or CTS. She drives, as I indicated, but  
17 rarely, due to vision issues and coughing spells. She smokes  
18 between one half and one pack of cigarettes a day, despite  
19 being advised by health care practitioners to stop.

20           She has essentially no hobbies. Medically she  
21 suffers from COPD and asthma, as well as pulmonary nodules,  
22 which are being monitored on a regular basis. She had  
23 bilateral CTS surgery in 2005 and has ongoing complaints of  
24 pain and uses braces on her wrists.

25           She suffers from depression. She claims to stay

1 home and frequently upstairs without even coming down to the  
2 main part of the house. She also suffers from swollen sweat  
3 glands on the bottom of her feet, and back pain. She has  
4 been treated at St. Mary's Family Health Center primarily by  
5 Nurse Practitioner Randie Salmon, and also Thomas Eagan, an  
6 orthopedist, with respect to wrists, leg and back pain.

7           Procedurally, plaintiff applied for Title II and  
8 Title XVI benefits on May 30, 2013, alleging an onset date of  
9 August 27, 2008. A hearing was conducted by Administrative  
10 Law Judge Arthur Patane on March 25, 2015. ALJ Patane issued  
11 a written decision on April 17, 2015, finding that the  
12 plaintiff was not disabled at the relevant times. That  
13 determination was upheld on appeal to the Social Security  
14 Administration Appeals Council on January 19, 2016, making  
15 the ALJ's decision a final determination of the Agency.

16           In his decision ALJ Patane applied the sequential  
17 five-step test for determining disability as set forth in the  
18 Acting Commissioner's regulations.

19           At step one finding that plaintiff had not engaged  
20 in substantial gainful activity since her alleged onset date.

21           At step two he concluded that plaintiff suffers  
22 from severe impairments, including COPD, or chronic  
23 obstructive pulmonary disease, as well as a history of  
24 asthma. In making that determination or finding, the ALJ  
25 rejected several other conditions, including plaintiff's

1 complaints concerning her hands and fingers and carpal tunnel  
2 syndrome, her swollen foot glands, blurred vision, reports of  
3 back pain, abdomen bloating, and depression.

4           At step three ALJ Patane concluded that plaintiff's  
5 conditions do not either singularly or in combination meet or  
6 medically equal any of the listed presumptively disabling  
7 conditions set forth in the Commissioner's regulations,  
8 specifically including 1.04; 3.02A, or COPD; 3.03A, asthma  
9 and bronchitis; 11.14, peripheral neuropathy; and also the  
10 mental health regulations listings in the 12.00 series,  
11 concluding in that regard that plaintiff's condition did not  
12 meet the B or C criteria.

13           The ALJ then concluded after surveying the evidence  
14 that plaintiff retains the residual functional capacity, or  
15 RFC, to perform a full range of light work, but can have no  
16 concentrated exposure to respiratory irritants such as fumes,  
17 odors, dusts, gases and poorly ventilated spaces.

18           Applying that RFC determination, the ALJ concluded  
19 that plaintiff is unable to perform her past relevant work in  
20 either of the two positions; one, because of the presence of  
21 respiratory irritants, and with regard to the cook condition,  
22 because it is performed at a medium exertional rate.

23           At step five the ALJ applied the medical vocational  
24 guidelines, or the Grids, specifically Rule 202.20, and  
25 concluded that plaintiff was not disabled at the time

1 relevant times.

2 As you know, my task is limited to determining  
3 whether correct legal principles were applied and the  
4 determination is supported by substantial evidence. It is a  
5 deferential standard of review that I must apply.

6 Looking carefully at the record, I agree with  
7 plaintiff that the RFC determination that plaintiff must only  
8 avoid concentrated irritants doesn't appear to be supported  
9 by anything in the record that would specifically say that  
10 Dr. Puri's opinion is very different, and says it is  
11 recommended that she not be in an environment which would  
12 increase her respiratory complaints. That is at page 340.  
13 And so given that and given the Nurse Practitioner Salmon  
14 medical source statement that came admittedly after the ALJ's  
15 determination concluding that plaintiff should not be exposed  
16 ever to dust, odors, fumes and pulmonary irritants, that's at  
17 page 464, I think that's a significant error.

18 Looking at step five I also think that there is a  
19 problem here. The burden at step five, of course, is on the  
20 Commissioner, and one of the things that must be determined  
21 is whether there are non-exertional limitations that would  
22 diminish the claimant's ability to perform the level of work  
23 in question, and whether, if there are such impairments,  
24 whether a vocational expert's testimony is required in order  
25 for the Commissioner to carry her burden. That is



1 well-established under *Bapp v. Bowen*. *Wilson versus*  
2 *Barnhart*, which I think was also cited, is another example of  
3 that.

4 Non-exertional impairment significantly limits a  
5 claimant's range of work when it causes an additional loss of  
6 work capacity beyond a negligible one, or when it is one that  
7 so narrows a claimant's possible range of work as to deprive  
8 him of a meaningful employment opportunity. In this case SSR  
9 85-15 controls and it speaks to the presence of  
10 non-exertional limitations.

11 Addressing environmental restrictions, the ruling  
12 notes that when a person has a medical restriction to avoid  
13 excessive amounts of noise, dust, et cetera, the impact on  
14 the broad world of work would be minimal because most job  
15 environments do not involve great noise, amounts of dust, et  
16 cetera. When an individual can tolerate very little noise,  
17 dust, et cetera, the impact on the ability to work would be  
18 considerable because very few job environments are entirely  
19 free of irritants, pollutants and other potentially damaging  
20 conditions.

21 Significantly, the ruling goes on to say where the  
22 environmental restriction falls between very little and  
23 excessive, resolution of the issue will generally require  
24 consultation of occupational reference materials or the  
25 services of a VE, Vocational Expert.

1           In this case what struck me was when I read the  
2 Administrative Law Judge's decision at page 30, I said there  
3 must be a paragraph missing, the typist must have missed it,  
4 because there is no discussion of why this environmental  
5 limitation does not require a Vocational Expert. I would  
6 have looked for between the second-to-last paragraph and the  
7 last paragraph on that page a discussion by the  
8 Administrative Law Judge as to why he believed resort to the  
9 Grids was proper and a Vocational Expert testimony was not  
10 required, particularly since of the uncertainty of what is  
11 meant by concentrated. Is that excessive? Is that  
12 coextensive with excessive? Does it fall between excessive  
13 and very little? And, of course, exacerbated by the  
14 additional finding that it does not coincide with Dr. Puri's  
15 opinion.

16           So I think this matter should be returned for a  
17 closer look at the environmental limitations experienced by  
18 the plaintiff. I don't find persuasive evidence of  
19 disability. So I will grant judgment on the pleadings to the  
20 plaintiff, vacate the Commissioner's determination, and  
21 remand the matter for further proceedings consistent with my  
22 opinion. And I'll issue a decision and enter judgment  
23 accordingly. Again, thank you both. Happy New Year.

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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official  
Realtime Court Reporter, in and for the United States  
District Court for the Northern District of New York,  
do hereby certify that pursuant to Section 753, Title 28,  
United States Code, that the foregoing is a true and correct  
transcript of the stenographically reported proceedings held  
in the above-entitled matter and that the transcript page  
format is in conformance with the regulations of the  
Judicial Conference of the United States.

A handwritten signature in cursive script, reading "Eileen McDonough", is positioned above a horizontal line.

EILEEN MCDONOUGH, RPR, CRR  
Federal Official Court Reporter